BRAD D. BRIAN (CA Bar No. 079001, *pro hac vice*)
Brad.Brian@mto.com
LUIS LI (CA Bar No. 156081, *pro hac vice*)
Luis.Li@mto.com
TRUC T. DO (CA Bar No. 191845, *pro hac vice*)
Truc.Do@mto.com
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, Thirty-Fifth Floor
Los Angeles, CA 90071-1560
Telephone: (213) 683-9100

THOMAS K. KELLY (AZ Bar No. 012025)
tskelly@kellydefense.com
425 E. Gurley
Prescott, Arizona 86301
Telephone: (928) 445-5484

Attorneys for Defendant JAMES ARTHUR RAY

SUPERIOR COURT OF STATE OF ARIZONA
COUNTY OF YAVAPAI

STATE OF ARIZONA,

Plaintiff,

vs.

JAMES ARTHUR RAY,

Defendant.

CASE NO. V1300CR201080049

DEFENDANT JAMES ARTHUR RAY'S RESPONSE TO STATE'S MOTION FOR PROTECTIVE ORDER

Date: November 1, 2010

Time: 1:30 p.m.

Division: B

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The State's motion for a protective order is frivolous. As the State knows, this Court previously ruled that the "State must disclose any and all notes, regardless of the organizational affiliation of the author, summarizing the [testifying experts'] oral communications." By this motion, the State attempts to re-litigate—with language copied nearly verbatim from its prior papers—the exact issue already decided by this Court and for which monetary sanctions were awarded against the State. The State's motion lacks any merit and should be denied.

II. FACTS

Rather than comply with the clear mandate of the Court's prior order, the State continues to flout its discovery obligations. A brief review of the facts is demonstrative:

- On September 10, 2010, the State retained Rick Ross—*a new expert witness*—to testify in its case against Mr. Ray.[1]
- The State withheld this new information for at least a month and notified Mr. Ray on October 13 of this new expert witness and its intent to call Mr. Ross at the November 9 evidentiary hearing on the alleged 404(b) acts, and at trial, in violation of its continuing duty to timely provide disclosure under Ariz. R. Crim. P. 15.1 and 15.6(a).[2]
- The State provided *no discovery* of Mr. Ross's proffered testimony, other than a curriculum vitae and an anemic five-word statement that he will testify to "group behavior."[3]
- The State's discovery violations are especially glaring in light of its knowing silence in response to the Court's admonitions regarding disclosure obligations at the October 4 status conference—nearly a month after Mr. Ross had been retained.[4]

---

[1] *See* Exhibit A, copy of Fee Agreement between the State and Mr. Ross executed and signed on September 10, 2010. The State disclosed this Fee Agreement to Mr. Ray on October 20, 2010.

[2] *See* Exhibit B, Sheila Polk's letter dated October 13, 2010.

[3] State's Twelfth Supplement Disclosure served on Mr. Ray October 14, 2010.

[4] Instead, the State disingenuously accused the defense of discovery violations. Making similar and false insinuations in its Motion for A Protective Order, the State is well aware that Mr. Ray has complied with his disclosure obligations

- Upon receipt of the State's notice, the defense immediately requested from the State discovery relating to the new witness, including "any and all *statements* made by Mr. Ross, including without limitations his own notes and the *State's notes memorializing Mr. Ross' statements*." As before, the defense did not request notes reflecting counsels' legal opinions, theories or conclusions.[5]
- The defense also urged the State to "reconsider [its] intention to proffer Mr. Ross' testimony at the [November 9] *Terrazas* 404(b) hearing" and invited the State to further meet and confer to resolve this discovery dispute.[6]
- The State never responded to counsel, ignoring also a subsequent email inviting the State to engage in good faith efforts to resolve the dispute. Instead, Mr. Ray learned of the State's withdrawal of Mr. Ross for the November 9 evidentiary hearing *in a footnote* to the State's Motion for Protective Order.[7] Motion for Protective Order at page 2, footnote 1.

III. ARGUMENT AND AUTHORITIES

Mr. Ray's discovery request is neither novel nor improper. Disclosure of an expert witness' statement is mandated by the disclosure rules and Arizona case law, as this Court recently affirmed in granting Mr. Ray's motion to compel the exact same discovery of the State's medical examiners. The State simply ignored Mr. Ray's discovery request, and never asserted the work product claim with the defense. Had the State engaged in good faith efforts to resolve its concerns with the defense, it would have been made clear (if it was not already) that Mr. Ray was not seeking the prosecutors' opinions, conclusions or theories, but only the statements of the State's new expert witness. Instead, the State filed this frivolous motion for a protective order without

---

under Ariz. R. Crim. P. 15.2 and has promptly responded to the State's discovery requests to date. If the State believed otherwise, it would move to compel disclosure from Mr. Ray, rather than continually block Mr. Ray's requests for disclosure from the State. The State's disappointing practice of making false accusations against the defense to deflect from its own discovery failures must stop.

[5] *See* Exhibit C (emphasis added).

[6] *See* Exhibit C, Truc T. Do's letter dated October 18, 2010.

[7] The State's lack of professional courtesy in promptly and directly notifying Mr. Ray of its withdrawal of Mr. Ross for the evidentiary hearing caused the defense to unnecessarily incur costs and waste time in preparing for a moot witness.

any good cause, as required by Ariz. R. Crim. P. 15.5(a). For these reasons, the Court should deny the State's motion for a protective order and admonish, once again, that the State comply with its disclosure obligations.

A. <u>The State Has Not Shown Good Cause for A Protective Order Pursuant to Ariz. R. Crim. P. 15.5(a).</u>

The issuance of a protective order is governed by Ariz. R. Crim. P. 15.5(a), which provides that:

> Upon motion of any party showing ***good cause***, the court may at any time order that disclosure of the identity of any witness be deferred for any reasonable period of time not to extend beyond five days prior to the date set for trial, ***or that any other disclosures required by this rule be denied***, deferred or regulated when it finds:
>
> (1) That the disclosure would result in a risk or harm outweighing any usefulness of the disclosure to any party; and
>
> (2) That the risk cannot be eliminated by a less substantial restriction of discovery rights.

Ariz. R. Crim. P. 15.5(a) (West 2010) (emphasis added). The State has not demonstrated good cause, nor can it.[8] Mr. Ray has requested only the statements of an expert witness that the State has offered to testify at trial, which statements he is entitled to as a matter of right under the discovery rules. The State very well knows from the clear language and narrow scope of the defense's discovery request that Mr. Ray does not seek the "opinions, theories or conclusions of the prosecutor." Ariz. R. Crim. 15.4(b) (West 2010).

B. <u>The State Is Required to Provide Disclosure of Any and All Statements Made By An Expert It Intends To Offer At Trial.</u>

The State noticed Mr. Ross as an expert witness for trial, not as a consultant. Rule 15.1(e)(3) provides that the "prosecutor ***shall***, within thirty days of a written request," disclose "[a]ny completed written reports, ***statements*** and examination notes made by experts listed in

[8] Although there is not good cause to grant the State's motion for a protective order, Rule 15.5(d) provides that "[i]f the court enters an order that any material, or any portion thereof, is not subject to disclosure under this rule, the entire text of the material shall be sealed and preserved in the record to be made available to the appellate court in the event of an appeal." Ariz. R. Crim. P. 15.5(d) (West 2010). Accordingly, Mr. Ray requests that the State turn over to the Court all notes which memorialize Mr. Ross' statements pending the resolution of its motion for a protective order.

subsections (b)(1) and (b)(4) of this rule in connection with the particular case." *Id.* 15.1(e)(3) (emphasis added). Rule 15.1(b)(1), in turn, requires the prosecutor to disclose "the names and addresses of all persons whom the prosecutor intends to call as witnesses in the case-in-chief together with their relevant or recorded ***statements***." *Id.* 15.1(b)(1) (emphasis added). Rule 15.4(a) defines "statement" to mean "a writing containing a verbatim record or a ***summary of a person's oral communications***." *Id.* 15.4(a)(1)(iii) (emphasis added).

As the State knows from recent litigation, a prosecutor's notes which memorialize statements made by a witness fall squarely within the ambit of the mandatory disclosure rule and are not work-product. *State v. Reid*, 114 Ariz. 16, 30 (1976); *State v. Nunez*, 23 Ariz.App. 462, 463; see *also* Hon. Warren R. Darrow, Under Advisement Ruling on Motion to Compel Disclosure of All Information and Material Regarding the Medical Examiners' Opinions on Cause of Death (ordering that the "State must disclose any and all notes, regardless of the organizational affiliation of the author, summarizing the medical examiners' oral communications at the meeting" since it was not recorded).[9]

The State's attempt to manufacture an exception to its mandatory disclosure obligations fails, since none exists. *See* Motion at 3:25 to 4:7. The courts in *Reid* and *Nunez* ordered the disclosure of the prosecutor's notes because the notes memorialized the oral communications of a testifying witness. *Reid, supra*, 114 Ariz. at 30; *Nunez, supra*, 23 Ariz.App. at 463. As did this Court in ordering disclosure of the prosecutor's notes of the medical examiners' statements. Even *State v. Jessen*, 130 Ariz. 1 (1981), a case cited by the State in its motion, mandates disclosure of the prosecutor's notes without exception.[10] The Arizona Supreme Court held in *Jessen* that:

---

[9] Here, the State has chosen to have Mr. Ross *not* write a report and it is assumed that Mr. Ross' statements were not otherwise recorded.

[10] The State's citation of *Hickman v. Taylor*, 329 U.S. 495 (1947) is equally puzzling since it does not support its work product claim. Motion at 6:16-25. *Hickman* provides for a ***limited*** attorney work product and only protects "writings which reflect an attorney's mental impressions, conclusions, opinions or legal theories," not factual statements of a witness. *Hickman*, 329 U.S. at 508. Moreover, Mr. Ray has not asked the State to "write out all that witnesses have told him and to deliver the account" to him, which was at issue in the specific passage cited by the State. Motion at 6:16-24. Mr. Ray has requested the prosecutor's *existing* notes which memorialize the statements of a testifying expert witness.

> "Rule 15.1(a) requires the State to produce the 'names and addresses of all persons whom the prosecutor will call as witnesses in the case-in-chief together with their relevant written or recorded statements. .... Rule 15.4(a)(1)(iii) defines 'statement' to include 'a writing containing ... a summary of a person's oral communications.' [The prosecutor's] notes, while short and predominantly cryptic, do reflect what [the witness] said to the prosecutor about the incident. The notes were a statement should have been disclosed."

Jessen, supra, 130 Ariz. at 4.

It is simply remarkable that the State continues to maintain indefensible and ill-conceived legal positions with respect to its disclosure obligations. These issues have been fully litigated, and the Court has already ruled against the State. Moreover, the Court was clear in its directive to the parties that this case will be not be a trial by ambush or surprise. Yet, the State seeks to end-run procedures designed to make the process fair and efficient.

IV. CONCLUSION

The State has failed to demonstrate good cause for the issuance of a protective order, under Ariz. R. Crim. P. 15.5(a), which would deny Mr. Ray his right to proper discovery under Rules 15.1 and 15.4. The Court should deny the State's motion and admonish the State to promptly comply with its disclosure obligations.

DATED: October 27, 2010

MUNGER, TOLLES & OLSON LLP
BRAD D. BRIAN
LUIS LI
TRUC T. DO

THOMAS K. KELLY

By: _____

Attorneys for Defendant James Arthur Ray

Copy of the forgoing emailed/mailed/faxed/ delivered this 27th day of October, 2010, to:
Sheila Polk
Yavapai County Attorney
255 E. Gurley
Prescott, Arizona 86301
By: _____

RICK ROSS Consultant, Lecturer and Intervention Specialist
1977 N. Olden Ave. Ext #272 Trenton, New Jersey 08618
Phone (609) 396-6684 Fax (609) 964-1842
Email rickross@rickross.com *Web Site URL* http://www.rickross.com

FEE AGREEMENT

Yavapai County Attorney, hereinafter referred to as "Client," retain RICK ROSS, hereinafter referred to as "RICK ROSS," as a consultant to devote his professional abilities regarding the following matter:

Consulting expert witness regarding the criminal trial of James Arthur Ray

This consultation is subject to the following conditions.

1. RICK ROSS will devote his professional ability to the case, and the Client agrees to fully cooperate.

2. It is agreed Client will pay a minimum non-refundable retainer in the sum of $2,500.00. (American dollars).

3. Client will be billed at a rate of $75.00 per hour for travel, $150.00 for preparation and consultation time and $200.00 per hour for court time (United States dollars), which is defined as any time spent within the courthouse. These hourly rates will be billed against the retainer. Billed time will begin when Rick Ross leaves his home/office to begin working and will end upon his return. That is, all travel time and/or work time will be billed at the rates above as specified per hour and/or day. **Travel arrangements will be made by Client.**

4. If and when fees computed exceed the retainer, Client will be billed. Client understands that fees may exceed the retainer, and the retainer does not necessarily constitute full payment for services.

5. Expenses will be billed to the Client. Expenses may include, but are not limited to travel expenses such as airfare, hotel, meals, tips, car rentals, long distance telephone calls, and/or any other expenses incurred through the performance of professional services related to the case. RICK ROSS will consult with the Client prior to incurring any extraordinary costs. Costs shall be paid as incurred, and are in addition to the retainer and/or fees.

6. **CLIENT ACKNOWLEDGES THAT RICK ROSS HAS MADE NO PROMISES OR GUARANTEES REGARDING THE OUTCOME OF CLIENT'S CASE.**

7. Client must pay all fees incurred upon receiving a bill. Client will be billed upon completion of case. RICK ROSS will determine this.

8. No services will be rendered on Client's behalf until the full amount of the retainer is paid.

9. In the event of nonpayment of the retainer or fees--RICK ROSS may withdraw from the case. If RICK ROSS should continue with the case under some other arrangement with Client. Such continuation will not constitute a waiver of any amount due previously. Any other services rendered on Client's behalf will be by separate agreement.

10. It is expressly agreed that if any bill is not paid in full within ten (10) days' the delinquent amount shall bear interest at the rate of 18% per year from the original date of billing.

11. In the event suit or collection is instituted to collect any portion of the fees due thereunder Client agrees to pay all costs and attorney's fees in an amount of not less than one-third of the amount awarded to RICK ROSS by the court and that the court of jurisdiction will be within the State of New Jersey.

12. Client agrees to keep RICK ROSS informed at all times of Client's mailing address and telephone number. As of the date of this Agreement, Client furnishes RICK ROSS with the following information.

MAILING ADDRESS:

Yavapai County Attorney's Office
Attn: Sheila Polk or Bill Hughes
255 E. Gurley Street, 3rd Floor
Prescott, AZ 86301

TELEPHONE NUMBERS:

Work: (928) 771-3344

Fax: (928) 771-3110

READ AND APPROVED this 10th day of September, 2010

CLIENT Sheila Polk
Sheila Polk, Yavapai County Attorney

CLIENT_____

RICK ROSS_____

Yavapai County Attorney

255 East Gurley Street
Prescott, AZ 86301
(928) 771-3344 (Criminal)
(928) 771-3338 (Civil)
Facsimile (928) 771-3110

SHEILA POLK
Yavapai County Attorney

October 13, 2010

VIA Email and US Mail

Truc T. Do
Munger, Tolles & Olson L.L.P.
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1560

Re: State v. James Arthur Ray, CR 201080049

Dear Ms. Do:

Evidentiary Hearings scheduled for November 9, 10 & 16:

With respect to the State's 404(b) acts, we will call the following witnesses:

Amayra Hamilton
Debra Mercer
Ted Mercer
Mickey Reynolds (tentative)
Vicki Rock (disclosure pertaining to this witness forthcoming)
Mark Rock (additional disclosure pertaining to this witness forthcoming
Rick Ross (disclosure pertaining to this witness forthcoming)
Det. Ross Diskin

We will introduce a video of the Defendant at a Modern Magic event, as well as photographs of the sweat lodge in 2008 and 2009. We will also introduce medical records of Daniel Pfankuch, previously disclosed to you. The photographs have all been disclosed; the video will disclosed shortly.

The State reserves the right to present additional witnesses and/or exhibits at the hearing.

Will you agree that the State will proceed first with our 404(b) hearing on November 9? The State does not intend to offer any evidence with respect to the other pending motions.

If you have any witnesses or evidence to present, please kindly let me know in advance.

Interviews of the Medical Examiners and the Detectives

Are you available to re-interview the medical examiners and detectives on the days immediately preceding or following the November hearings? Conducting interviews on those dates will minimize costs associated therein.

Please provide to my assistant, Penny Cramer, the days you are available for interviews so that she may schedule them. If you cannot do the re-interviews in November when you are already in the area, I ask you again to reconsider your outright rejection of the State's proposal to conduct the re-interviews via video-conferencing.

Please do not hesitate to contact me if you have any questions or need anything further.

Very truly yours,

Sheila S Polk

Sheila Sullivan Polk
Yavapai County Attorney

MUNGER, TOLLES & OLSON LLP

355 SOUTH GRAND AVENUE
THIRTY-FIFTH FLOOR
LOS ANGELES, CALIFORNIA 90071-1560
TELEPHONE (213) 683-9100
FACSIMILE (213) 687-3702

560 MISSION STREET
SAN FRANCISCO, CALIFORNIA 94105-2907
TELEPHONE (415) 512-4000
FACSIMILE (415) 512-4077

October 18, 2010

VIA EMAIL

WRITER'S DIRECT LINE
(213) 683-9154
(213) 683-5154 FAX
Truc Do@mto com

Sheila Polk
Yavapai County Attorney's Office
255 East Gurley Street
Prescott, Arizona 86301

Re: *State v. James Arthur Ray*

Dear Sheila:

I am writing regarding the State's non-compliance with the Court's September 20th order for disclosures and to address my concerns of late discovery raised by your October 13 letter and Twelfth Supplemental Disclosure Statement.

Non-Compliance with Court-Ordered Disclosures

At your suggestion, Mr. Ray postponed rescheduling the re-interviews of the medical examiners and the detectives in order to receive all notes ordered by the Court. As of today's date, we have not received the State's full compliance with the Court's order for disclosure of "any and all notes, regardless of the organizational affiliation of the author, summarizing the medical examiners' oral communications at the [December 14, 2009] meeting." According to Mr. Hughes' letter of September 22, 2010, the State believes there were at least eighteen (18) people at the meeting. On October 12, 2010, we received the State's Thirteenth Disclosure which contained *three pages* of redacted notes taken by you and Ms. Durrer only.

Please let me know if you have made inquiries with the other sixteen people at the meeting and when Mr. Ray might expect the State's full compliance with the Court's order. Moreover, the State requested that Mr. Ray minimize costs associated with the court-ordered

disclosure. However, the State's failure to fully and promptly comply with the Order is requiring counsel to expend further time and effort in bringing closure to this issue.

Additional Discovery Violation – State's Twelfth Supplemental Disclosure

We received your letter dated October 13 and the State's Twelfth Supplemental Disclosure on October 14. With seventeen (17) court days before three days of evidentiary hearings on three separate motions *in limine* by Mr. Ray, the State has just noticed a new expert witness, Rick Ross, that it intends to call for trial and, apparently, for the evidentiary hearings. In addition to the late notice, the State has not provided the defense with any disclosure regarding Mr. Ross other than a curriculum vitae.

Based upon my review of Mr. Ross' curriculum vitae, it appears that the State is proffering Mr. Ross on alleged "destructive cults and cult psychology." The State has had Mr. Ray's motions *in limine* to exclude this very type of inflammatory and inadmissible character evidence ***since July 6, 2010***. Indeed, as you well know, we were scheduled to proceed to trial nearly two months ago. Surely there are no new facts or developments that delayed the State from identifying and selecting Mr. Ross as a witness. The State's very late and insufficient disclosure of Mr. Ross has denied Mr. Ray an opportunity to move to exclude Mr. Ross' testimony under numerous principles of Arizona law, including relevancy and possibly *Daubert* grounds.

I request that you disclose when the State first contacted Mr. Ross as an expert for trial in this matter so that we may understand the timeliness of the State's disclosure under Ariz. R. Crim. P. 15.1(b)(5) and 15.6.

Furthermore, while you indicated that you have no report from Mr. Ross at this time, I am sure that the State is not calling Mr. Ross without first having had some conversation with Mr. Ross regarding his opinions, conclusions, and the scope of his proffered testimony. Pursuant to Ariz. R. Crim. P. 15.1.(e)(3) and *State v. Reid*, 114 Ariz. 16, 30 (1976), Mr. Ray requests any and all statements made by Mr. Ross, including without limitations his own notes and the State's notes memorializing Mr. Ross' statements.

Evidentiary Hearings

The State's intention to call Mr. Ross as a witness relating to 404(b) issues is inappropriate. First, the disclosure is prejudicially late and incomplete. As noted above, the disclosure comes just two weeks before the hearing on our motions and *months after* the moving papers and the responses were filed. In addition, the State has not provided a report or identified the substance of Mr. Ross' testimony other than that he "[w]ill testify regarding group behavior." This is exactly the trial by ambush Judge Darrow cautioned both parties to avoid at our last status conference. The defense does not have sufficient time to properly investigate and evaluate Mr. Ross' qualifications, his prior testimony and his proposed testimony.

Second, it is entirely inappropriate for the State to call an expert at a 404(b) hearing pursuant to *State v Terrazas,* 189 Ariz. 580, 582 (1997). As you well know, the *Terrazas* hearing is to determine *whether* the State can establish with clear and convincing evidence that alleged prior bad acts occurred. Mr. Ross was not a percipient witness to any of the alleged incidents and, thus, we fail to see what competent, relevant and probative evidence Mr. Ross will proffer at a *Terrazas* hearing. Even assuming (for argument only) that Mr. Ross is a qualified expert and that his purported area of expertise is suitable for expert testimony – both largely suspect assumptions which will be the subject of a defense motion – he has no role in a *Terrazas* hearing.

Third, Mr. Ross' proposed testimony – to the extent we even understand it – is not proper even for trial. Once we have received the discovery the State is required to produce, we will likely file a motion to exclude his testimony. It is premature for the State to proffer his testimony before there has been a ruling on whether the purported expert testimony is even admissible.

For all of the above-reasons, we ask that you reconsider your intention to proffer Mr. Ross' testimony at the *Terrazas* 404(b) hearing.

Please also be advised that Mr. Ray will not be stipulating to the foundation and authenticity of any records when the evidentiary hearings go forward, including without limitations the medical records of Daniel Pfankuch. We are happy to discuss stipulations for trial, but given the significance of his motions *in limine*, Mr. Ray is unable to accommodate the State at the evidentiary hearings. If the State intends to introduce medical evidence, please make sure competent witnesses attend to properly authenticate such records and to offer any opinions about medical causation or conditions.

Re-Interviews of the Medical Examiners and Detectives

Subject to Mr. Ray's concerns of going forward with the evidentiary hearings given the State's late disclosure of a new expert witness, we are happy to minimize costs to the State in connection with re-interviews by conducting the interviews while Mr. Li and I are already present in Yavapai County for the hearings. However, we cannot agree that Mr. Ray will be limited in recovering costs and monetary sanctions against the State for discovery violations should the re-interviews require more than one visit.

I look forward to hearing from you and, as always, please feel free to contact me if you would like to discuss any of these matters further. Thank you in advance for your professional courtesy and cooperation.

Sincerely,

Truc T. Do